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In

The Supreme Court

of the United States

October Term, 1948

No. 710

R. C. GLOVER, M. C. FINDLEY and TINKHAM GILBERT, Trustees under the Will of Sarah E. Carrier, Deceased, Petitioners,

v.

J. W. MALONEY, Collector of Internal Revenue for the District of Oregon, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

R. C. Glover, M. C. Findley and
Tinkham Gilbert, Trustees under the
Will of Sarah E. Carrier, Deceased,
Petitioners.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT OF PETITION.

Petition to the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The above-named petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the judgment and decree of that court (R. 77) entered on January 13, 1949, reversing a judgment of the District Court of the United States for the District of Oregon which held that petitioners were entitled to a refund of federal income taxes, paid by their

predecessors in interest, for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942. (R. 24.)

JURISDICTION.

The jurisdiction of this court is invoked under the provisions of Title 28, United States Code, Section 1254(1).

THE OPINIONS OF THE COURTS BELOW.

The opinion of the District Court of the United States for the District of Oregon (R. 18) is not reported. The opinion of the United States Court of Appeals for the Ninth Circuit (R. 72) is reported at 171 Fed. (2d) 870.

STATUTE INVOLVED.

The relevant provisions of the Internal Revenue Code are contained in Section 162, particularly Subsection (a) (26 U. S. C., Sec. 162(a)), which is as follows:

> "The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—
>
> (a) There shall be allowed as a deduction (in lieu of the deduction for charitable, etc., contributions authorized by section 23(o)) any part of the gross income, without limitation, which pursuant to the terms

of the will or deed creating the trust, is during the taxable year paid or permanently set aside for the purposes and in the manner specified in section 23(o), or is to be used exclusively for religious, charitable, scientific, literary, or educational purposes, ..."

SUMMARY STATEMENT OF MATTER INVOLVED.

Petitioners are trustees under the Will of Sarah E. Carrier, who died on January 27, 1940. Her Last Will and Testament, after providing for certain specific bequests, devised and bequeathed the residue and remainder of her estate to designated charitable, religious and educational organizations as follows: 5/20ths thereof directly to designated charitable, religious and educational organizations and the remaining 15/20ths thereof to petitioners herein as trustees upon the following terms:

". . . to be held by them in trust for ten years after my decease, and safely invested by them and the income derived therefrom to be devoted to the care and maintenance of such blood relatives of myself and of my deceased husband, the late Burton E. Carrier, not farther removed than first cousins, who in the judgment of said trustees are in need of financial assistance, if any there should be, and in such sums as may seem wise to said trustees, it being my direction that the corpus of said trust fund be kept intact and such interest and income derived therefrom as is not used for the purposes above indicated to be added thereto and upon the expiration of said trust period of ten years after my decease said trustees divide all of the funds

in their possession as such trustees, including the corpus of said trust fund and accumulated interest and income derived therefrom and not otherwise disposed of under the authority herein conferred, into four parts, of equal value, and execute such instruments as may be required by the laws of Oregon to transfer the same in equal portions to the following institutions," (naming them) (R. 20)

QUESTION PRESENTED.

Whether or not the income received by the administratrices c.t.a. of the estate, petitioners' predecessors in interest, *during the course of administration of the estate*, was, pursuant to the terms of the will, permanently set aside for charitable purposes so as to authorize the deduction allowed by Section 162(a) of the Internal Revenue Code. (26 U. S. C. Sec. 162(a)).

FACTS.

Sarah E. Carrier died testate on January 27, 1940. The administratrices c.t.a. of the estate, petitioners' predecessors in interest, filed income tax returns for the estate for the period from January 27, 1940, to December 31, 1940, and for the calendar years 1941 and 1942, and paid to respondent the full amount of tax on all net income received by the estate during these periods. (R. 20.) The estate remained in the course of administration until March 30, 1943, when

15/20ths of the residue was transferred to petitioners herein as trustees in accordance with the terms of the Last Will and Testament of the decedent. (R. 21.)

The net income of the estate during the course of administration was as follows: For the period from January 27, 1940, to December 31, 1940, $25,356.42; for the calendar year 1941, $21,784.04; and for the calendar year 1942, $24,592.67. (R. 44, Exhibits 1, 2 and 3.) No payments were made to the relatives during the course of administration of the estate. (R. 21.)

Respondent voluntarily refunded the tax on 5/20ths of the income for each of the periods and thereafter petitioners duly filed timely claims for refund of $3,410.20 for the period from January 27, 1940, to December 31, 1940; $3,519.69 for the calendar year 1941; and $3,627.60 for the calendar year 1942, which amounts represented the remaining 15/20ths of said tax payments. The claims for refund were denied by the Commissioner of Internal Revenue. (R. 22.) The present suit for refund was thereafter commenced in the District Court of the United States for the District of Oregon.

The testamentary trust was established on March 30, 1943, and the gross income, expenses and amounts paid to indigent relatives between that time and the time this case was tried in the District Court have been as follows (R. 22):

Period	Gross Income*	Expenses	Payments
3/31/43 to 12/31/43	$21,536.02	$2,100.00	$ 675.00
1944	26,147.74	2,540.63	1,800.00
1945	23,101.16	1,438.86	1,800.00
1946	22,667.09	694.63	1,800.00
Totals	$93,452.01	$6,744.12	$6,075.00

*Includes the 5/20ths interest of the charitable organizations which received their shares directly. Their shares have been administered by the same trustees pursuant to an agreement between such organizations and the trustees to effect an orderly liquidation and disposition of the assets of the estate.

THE DECISIONS BELOW.

The District Court found that the income received by the administratrices during the course of administration of the estate was, pursuant to the terms of the will, permanently set aside for charitable purposes so as to authorize the deduction allowed by Section 162(a) of the Internal Revenue Code (R. 23); that the taxes in question were, therefore, illegally collected by the respondent (R. 23), and that petitioners were entitled to a refund of the taxes so paid. (R.23.) The District Court found it unnecessary to make any findings on the additional proposition urged by petitioners at that time and also in the United States Court of Appeals for the Ninth Circuit, namely, that the annual income of the trust has been and will be so greatly in excess of any valid claims against the trustees that there is no practical possibility that the income *of the estate* will ever have to be resorted to in order to pay such claims in later years.

The Court of Appeals reversed the decision of the District Court on the sole ground that, under Oregon law, when property is bequeathed in trust to pay the income therefrom to a beneficiary for life or for a limited time, such beneficiary is entitled to payment of the income from the death of the testator, rather than from the date of the delivery of the estate to the trustee, unless otherwise provided in the will. The Court of Appeals briefly dismissed petitioners' additional argument as to the unlikelihood of later resort to income *of the estate* as "a matter purely of speculation" (R. 76) despite the relative amounts of income of the trust and payments to indigent relatives since the closing of the estate as hereinbefore stated.

REASONS RELIED ON FOR ALLOWANCE OF THIS WRIT.

A writ of certiorari should be issued in this case, it is submitted, because the United States Court of Appeals for the Ninth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court and has rendered a decision in conflict with the Court of Appeals for the Sixth Circuit. See *Commissioner v. Upjohn's Estate* (1941) (6th Circuit) 124 Fed. (2d) 73.

We earnestly submit that the question here involved has been erroneously decided by the Court of Appeals in

view of the applicable decisions of this court, as set forth in petitioners' brief in support of this petition. The judgment of the Court of Appeals, if left undisturbed, will result in the payment of these taxes by organizations which are admittedly charitable or religious in nature and purpose, contrary to public policy. *Old Colony Trust Co. v. Commissioner,* 301 U. S. 379, 57 S. Ct. 813.

It is further submitted that this Court should resolve the apparent conflict between the decisions of the Ninth and Sixth Circuits of the United States Courts of Appeal and pronounce a rule to be uniformly followed.

WHEREFORE, petitioners respectfully pray that a writ of certiorari issue under the seal of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit in the above case.

R. C. GLOVER, M. C. FINDLEY and
TINKHAM GILBERT, Trustees under
the Will of Sarah E. Carrier, Deceased,
Petitioners.

CARL E. DAVIDSON,
CHARLES P. DUFFY,
Counsel for Petitioners.

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J. W. MALONEY, Collector of Internal Revenue for the District of Oregon, Respondent.

BRIEF IN SUPPORT OF PETITION

JURISDICTION, QUESTION PRESENTED, STATEMENT OF CASE, STATUTE INVOLVED, ETC.

The jurisdiction, statement of the question presented, statement of the case, and the statute involved are set forth in the petition.

SPECIFICATION OF ERRORS.

We respectfully submit that the United States Court of Appeals for the Ninth Circuit erred in the following respects:

(a) In holding that the income received by the ad-

ministratrices c.t.a. of the estate, petitioners' predecessors in interest, during the course of administration of the estate, was not, pursuant to the terms of the will, permanently set aside for charitable purposes so as to authorize the deduction allowed by Section 162(a) of the Internal Revenue Code. (26 U. S. C. Sec. 162(a)).

(b) In disregarding the fact that the annual income of the trust has been and will be so greatly in excess of any valid claims against the trustees that there is no practical possibility that the income *of the estate* will ever have to be resorted to in order to pay such claims in later years.

I. **The income received by the administratrices during the course of administration of the Estate of Sarah E. Carrier, deceased, was permanently set aside for charitable purposes pursuant to the terms of the Last Will and Testament of the decedent.**

It is petitioners' interpretation of the Will of Sarah E. Carrier that the income of the estate became a part of the corpus of the trust, that is, that no right to payment of the income could be asserted by the private beneficiaries until the estate was closed and the trust established by distribution of the assets to the trustees. Her will directed payment by the trustees to her relatives "who in the judgment of said trustees" were in need of financial assistance and in such sums "as may seem wise" to said trustees. Obviously, this discretion could not be exercised by the trustees until

they came into being after the administration of the estate was completed. The will gave no such discretionary powers to the administratrices. It must be assumed that the testatrix was aware of the fact that a certain period of time would be consumed in the administration of the estate.

No part of the income of the Carrier Trust which is not currently used for the benefit of relatives in financial need may be later used for that purpose. By the terms of the will there is a clear direction to the trustees to add to the corpus the income "not used" for the benefit of relatives. (R. 20.) This direction evidently does not apply to the disposition of the fund at the termination of the trust, as there is a separate provision for distribution of the unused income. The will does not provide when such unused income shall be added, but it seems to have been the plain intention of the testatrix that when income is received, the trustees shall, pursuant to the terms of the will, determine if it is required for relatives, and if they determine it is not, it shall be "added" to the corpus. If this is not the meaning of the will, the provision for adding unused income to the corpus is entirely meaningless, and we believe that the Court of Appeals should have given effect to each provision in the will.

The Court of Appeals apparently misconstrued decisions of the Supreme Court of the State of Oregon in ruling on this point. The opinion of the Court of Appeals (R. 72)

cited only the Oregon case of *Kinney v. Uglow,* 163 Ore. 539, 98 Pac. (2d) 1006, for its determination that income of the Estate of Sarah E. Carrier during the course of administration inured to the benefit of her relatives who might later be deemed by the trustees to be in need of financial assistance. Here, however, there were no fixed life beneficiaries of the income as in *Kinney v. Uglow,* supra, as the Will of Sarah E. Carrier directed payment by the trustees to her relatives "who in the judgment of said trustees" were in need of financial assistance and in such sums "as may seem wise" to said trustees. The trustees could not exercise this discretion until they came into being after the administration of the estate was completed and the trust established. The administratrices c.t.a. were given no such discretionary powers and had no authority to make such payments. Then, too, the income to be devoted to the indigent relatives by the trustees was "the income derived therefrom," referring to the "rest, residue and remainder" of the estate. There is no direction to devote the income from the gross estate for this purpose. The Oregon Supreme Court, in its decision in the case of *In Re Feebely's Estate,* 179 Ore. 250, 170 Pac. (2d) 757, decided since *Kinney v. Uglow,* supra, quoted from the opinion by the Honorable Fred M. Vinson in the case of *Proctor v. American Security and Trust Co.,* 69 App. D. C. 70, 98 F. (2d) 599:

"We are unable to get away from the idea that when this testator set up these residuary trusts and directed that the 'rest, residue and remainder' of his estate should be transferred to such trusts and that the life beneficiaries thereof were to receive the 'net income' therefrom, he meant what he said. From the earliest decisions, as we read them, the 'rest, residue and remainder' of an estate meant all property not expressly disposed of by the will. After subtracting the costs of administration, debts, specific devises and legacies from the entire estate then existing, that which remains is the 'rest, residue and remainder.' Thereupon, such property was transferred to the residuary trust, and it was the net income from such trust that such life beneficiaries were entitled to receive."

II. **The annual income of the trust has been and will be so greatly in excess of any valid claims against the trustees that there is no practical possibility that the income of the estate will ever have to be resorted to in order to pay such claims in later years.**

Although we are concerned here only with the taxability of the income of the estate, not the income of the trust, it is enlightening to compare the gross income of the trust with the amounts actually paid to indigent relatives since the trust was established on March 30, 1943. These figures (R. 22) demonstrate the fact that there is no practical possibility that the income *of the estate* will ever have to be resorted to in order to pay claims of indigent relatives in the few remaining years of the trust. It "is to be used exclusively for religious, charitable, scientific, literary, or educational pur-

poses" as provided in Section 162(a) of the Internal Revenue Code. There is "no uncertainty appreciably greater than the general uncertainty that attends human affairs." *Ithaca Trust Co. v. U. S.*, 279 U. S. 151, 49 S. Ct. 291.

All of the relatives were furnished with a copy of the will of the decedent (R. 50) and were advised as to their right to put in a claim for their "care and maintenance" (R. 20) (not "pleasure," "comfort" or "happiness" as in *Merchants National Bank of Boston v. Commissioner*, 320 U. S. 256, 64 S. Ct. 108, and *Henslee v. Union Planters National Bank & Trust Co.*, ...U. S. ....., 69 S. Ct. 290, No. 90, decided January 3, 1949) for consideration by the trustees, but only three relatives applied and two claims were allowed for small amounts. There are no prospective applications. (R. 50.). It may be possible to imagine some financial disaster which could strike a great number of the relatives within the specified degree of kinship, but we earnestly submit that the imposition of taxes should not rest upon such speculation and conjecture.

Petitioners submit that the rule announced by the United States Court of Appeals for the Sixth Circuit in the case of *Commissioner v. Upjohn's Estate*, supra, should be followed, rather than the ruling of the Ninth Circuit in the instant case which dismissed petitioners' argument on this proposition as follows (R. 76):

"The extent to which the income would be devoted to the needs of this class was, and indeed still remains, a matter purely of speculation. Perhaps little of it may be so devoted, but it is entirely possible that the whole of it will be. The ultimate beneficiaries, namely, the charitable institutions designated in the will, may get none of it."

On the other hand, the opinion of the Sixth Circuit in the *Upjohn* case, supra, in applying Section 162(a) of the Internal Revenue Code, after declaring that the statement so often made in the cases that "taxation is a practical matter" was not a mere euphemism, useful when taxes are to be imposed but to be ignored when they are sought to be avoided, said:

"We find ourselves in agreement with the court of the Tenth Circuit, in Commissioner v. F. G. Bonfils Trust, 115 F. 2d 788, and with the Board of Tax Appeals, that the bare possibility, considered abstractly and merely in terms of power, of an invasion of a fund devoted to charitable purposes, that is so remote that it may not, as a practical matter, be said to exist at all, does not render incapable of definite ascertainment the fund devoted to the beneficent purposes recited in the act. It is idle to speculate upon remote possibilities of diversion of the trust fund to non-charitable uses. If such speculations were dependable criteria for determining deductions, congressional encouragement to private benefaction would prove futile and no charitable trust could escape the charge that it is without the deductible section of the statute. It is true, of course, as noted in the dissenting opinion in

the Bonfils case, that deductions from gross income depend upon legislative grace; that the usual presumptions in favor of the taxpayer do not apply when exemption from taxation is claimed; and that when the taxpayer seeks deduction, authority therefor must be found in the statute and he must bring himself within its terms. This does not mean, however, that the problem may not be viewed realistically as in the Bonfils case, or that the plain intent of Congress to encourage charitable contributions by relieving them from taxation should be ignored. Lederer v. Stockton, 260 U. S. 3, 43 S. Ct. 5, 67 L. Ed. 99; United States v. Provident Trust Company, supra. So viewed, we conclude that the testator intended annual expenses and annuities to be paid out of current annual income, that he envisioned no circumstances reasonably expectable that they could not so be paid since reasonably predictable income was from 3 to 4 times the obligations of the trust, and that there was no intention that excess income for one year should be used to pay charges upon the fund in any other year. The Commissioner's premise in this respect being rejected, his conclusion that the charitable bequest was not definitely ascertainable, fails."

The United States Court of Appeals for the Tenth Circuit has also adopted this salutary rule in applying Section 162(a) of the Internal Revenue Code. In the case of *Commissioner v. F. G. Bonfils Trust,* supra, there was involved a testamentary trust with the income going in the form of annuities to several life beneficiaries and the remainder to charity. The principal could be invaded by the trustee if

necessary. Actually, the income of the trust was greatly in excess of the requirements. The court held that the trust was entitled to the deduction allowed by Section 162(a). The Circuit Court of Appeals made a careful analysis of the cases on both sides of the question and stated that:

> "The determination of this question turns on whether we should blindly adhere to the terms of the will which provide for recourse to corpus in the event income is insufficient to pay annuities, or whether we should be realistic and determine the effect of the terms of the will in the light of the amount of the corpus, the income therefrom, and the amount of the annuities. In other words, whether we should give regard to mere theory or to actuality."

We submit that the Court of Appeals in the case at bar has decided a federal question, namely, the interpretation and application of Section 162(a) of the Internal Revenue Code, in a way in conflict with the decision of this court in *Ithaca Trust Company v. U. S.* supra. Although this court in that case was considering an estate tax question under Section 812(d) of the Internal Revenue Code, rather than Section 162(a), as in the instant case, the practical approach to the problem would seem to be even more appropriate in an income tax matter, where the previous year's experience can be reviewed before determining what deductions are allowable, than in an estate tax matter where the deductions must be determined in light of the facts known at the date of death.

CONCLUSION.

It is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

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Counsel for Petitioners.